Wee Lian Construction Sdn Bhd v Ingersoll–Jati Malaysia Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–262 OF 2000
KAMALANATHAN RATNAM J
22 SEPTEMBER 2004

Contract — Terms — Condition — Purchase of machinery — Whether supplied with wrong component — Inspection of goods — Whether buyer accorded reasonable to do so — Whether entitled to reject goods after 22 months of usage — Whether right to reject ceased upon acceptance of goods — Whether clause in sale and purchase agreement applies to manufactured and delivered goods — Exclusion or limitation of liability clause — Whether parties bound by clause upon appending signature — Sale of Goods Act 1957 s 15

The plaintiff and the defendant had entered into an agreement ('the agreement') for the sale of a used machine, an Ingersoll-Rand CM 351 Crawlair Drill fitted with a VL140 Drifter ('the machine') at a price of RM130,000 subject to the terms and conditions contained in the purchase order. The machine was inspected and accepted by the plaintiff without objection. The plaintiff did not elect to engage their own independent technical advisers for a second opinion on the machine despite being accorded the opportunity to do so by the defendants. It was stated that the machine was fitted with a VL140 drifter prior to delivery to the plaintiff. The agreed warranty period was for six months and no complaint was raised during that time. After the expiry of the six months' warranty period, the defendant continued to provide goods, after-sales service and repairs on the used machine, as and when requested by the plaintiff. 22 months later, the plaintiff complained that the machine was fitted with a VL120 drifter and not VL140, and refused to settle the repair costs.

The issues for consideration were: (a) whether the machine was fitted with wrong drifter and therefore tantamount to a breach under s 15 of the Sale of Goods Act 1957 ('SOGA'); (b) whether cl 11 of the agreement was applicable and excluded the defendant's liability under the agreement; (c) whether the effect of exclusion or limitation of liability in cl 11 superseded or varied by cl 8.3 of the agreement ; (d) whether the plaintiff was entitled to use UK Unfair Contracts Terms Act 1977 ('UCTA'); (e) whether cl 11 of the said agreement contravened public policy as per s 24(e) of the Contracts Act 1950 ('CA'); and (f) whether the claim for damages against the defendant was established.

Held, dismissing the plaintiff's claim and allowing the defendant's counter claim:

(1) In determining the difference between a VL120 Drifter and a VL140 Drifter an application of the 'finger test' or 'visual test' would have easily revealed the differences. The difference between both types of

drifters also could have been easily verifiable upon the plaintiff obtaining a second opinion. The plaintiff elected not to do despite the defendant's advice. Further, the plaintiff had sufficient time to see if the Drifter was VL120 or a VL140 but had chosen to complain after using the said machine for 22 months. Accordingly, there was no breach of s 15 of the SOGA as claimed by the plaintiff (see para 8).

(2) The time and place of delivery is prima facie an important factor and, dependent upon the circumstances of each case. The plaintiff had been given the opportunity to inspect the machine even after delivery. The plaintiff's conduct of purchasing another new drifter which had been modified to suit the machine and then sought to claim damages for non-conformity with description and alleged under-production loss, long after the expiry of the six-month warranty period was unwarranted. Therefore, once a buyer is deemed to have accepted the goods, he loses his right to reject the same for breach of conditions (see para 14).

(3) Clause 11 of the agreement which contracted out all implied warranties, conditions and representations is applicable for both manufactured and delivered goods. Further, based on the conduct of both parties namely the defendant by providing free after-sales services to the plaintiff for six months and the increased warranty period from three months to six months, meant that the parties had accepted the period specified and that cl 11 applied. Therefore, plaintiff's contention that cl 11 applied only to manufactured goods was rejected (see para 21).

(4) Where an exclusion clause or a limitation of liability clause is incorporated in a document signed by the person sought to be held bound by it, he or she is bound by what he signs whether he has read it or not unless its effect has been misrepresented (see para 38); *L'Estran*ge v *F Graucob Ltd* [1934] 2 KB 394 followed.

(5) Although a limitation clause had to be clearly and unambiguously expressed in order to be effective and was to be construed contra proferentem, the relevant words were, if possible, to be given their natural, plain meaning. Thus, a limitation clause was not to be construed as rigidly and strictly as an exclusion clause since an agreed limitation of liability was more likely to be in accordance with the true intention of the parties (see para 39).

(6) The plaintiff's notice to the company the United States was not notice to the defendant as both are separate entities. The plaintiff had only referred to the defendant as a company incorporated in Malaysia and further, had made no averments in the pleadings that notice to the company in the United States as notice to the defendant. As such the plaintiff is bound by its pleadings (see para 24).

(7) It was not appropriate to rely on the UCTA and import its provisions into local law without express local legislation allowing it. The Contracts Act and the Specific Relief Act which provide for most remedies were adequately comprehensive to cover the remedies provided for by the English Common Law (see paras 32 and 35).

(8) Section 24(e) of the CA applies to the consideration or object of an agreement which is illegal or unlawful and thus against public policy. In this case, neither the consideration nor the object of the agreement is illegal or unlawful (see para 37).

(9) The plaintiff's basis of calculation of damages was unsupported by documentary evidence and the established facts of the case. The method of computing the alleged damages sum appears to be arbitrary, none of monthly statements of accounts for rock purchased and the types was put forward, no audited accounts for alleged profit and profit after a new replacement drifter was furnished, failure of the plaintiff in deducting the operating expenses, failure of plaintiff in taking into consideration performance and the efficiency of used machine (see para 43).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki satu perjanjian ('perjanjian tersebut') berkenaan suatu penjualan mesin terpakai yang dikenali sebagai 'Ingersoll-Rand CM 351 Crawlair Drill fitted with a VL140 Drifter" ('mesin tersebut') untuk harga RM130,000 berdasarkan terma-terma dan syarat-syarat nota belian. Mesin tersebut telah diperiksa dan telah diterima oleh plaintif tanpa bantahan. Plaintif telah memilih untuk tidak melantik penasihat teknikal bebasnya untuk pendapat kedua mengenai mesin tersebut walaupun defendan telah menyuruh plaintif berbuat demikian. Mesin tersebut telah disahkan sesuai dengan 'VL140 drifter' sebelum penyerahan mesin tersebut oleh plaintif. Tempoh waranti yang dipersetujui adalah enam bulan dan tiada aduan dalam tempoh waranti ini. Defendan selepas tamat tempoh waranti ini terus membekalkan barang-barang, pembaikpulihan dan penyelenggaraan selepas jualan pada bila masa atas permohonan plaintif. Plaintif selepas 22 bulan menggunakan mesin tersebut telah mengadu bahawa mesin tersebut sesuai dengan 'VL120 drifter' dan bukannya 'VL140' dan enggan membayar bayaran pembaikan.

Isu-isu untuk pertimbangan adalah: (a) sama ada meachine tersebut sesuai dengan 'VL140' atau 'VL120 drifter' dan dengan itu memecah s 15 Akta Jualan Barang-Barang 1957 ('AJB'); (b) sama ada kl 11 perjanjian tersebut adalah terpakai dan mengecualikan liabiliti defendan di bawah perjanjian tersebut; (c) sama ada kesan pengecualian atau had liabiliti di dalam kl 11 mengatasi kl 8.3 perjanjian tersebut ; (d) sama ada plaintif berhak untuk

menerimapakai Unfair Contracts Terms Act 1977 ('UCTA'); (e) sama ada kl 11 perjanjian tersebut bertentangan dengan polisi awan seperti yang diperuntukkan di bawah s 24(e) Akta Kontrak 1950 ('AK'); dan (f) sama ada kerugian yang dituntut oleh telah dibuktikan terhadap defendan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Dalam menentukan perbezaan di antara 'VL120 Drifter' dan 'VL140 Drifter' pemakaian prinsip 'finger test' atau 'visual test' dengan mudahnya mendedahkan perbezaannya. Perbezaan di antara kedua-dua jenis 'drifter' juga dapat disahkan menerusi pemerolehan pendapat kedua. Plaintif telah memilih untuk tidak berbuat demikian sungguhpun nasihat telah diberikan oleh defendan. Malah, plaintif mempunyai masa yang memadai untuk melihat sama ada 'Drifter' tersebut adalah jenis 'VL120' atau 'VL140' tetapi telah berdiam diri selama 22 bulan selepas menggunakannya. Oleh yang demikian, tidak terdapat sebarang pemecahan s 15 AJB seperti yang dituntut oleh plaintif (lihat perenggan 8).

(2) Masa dan tempat penyerahan secara prima facie adalah faktor penting dan ini bergantung kepada fakta-fakta setiap kes tersebut. Plaintif telah diberikan peluang yang munasabah untuk memeriksa mesin tersebut sebelum dan selepas penyerahan. Tingkah laku plaintif yang membeli satu lagi 'Drifter' baru yang mana telah diubahsuai untuk memenuhi mesin tersebut dan kemudiannya menuntut ganti rugi untuk ketidaksahan dengan diskripsi dan dakwaan kehilangan pengeluaran selepas tamat tempoh enam bulan waranti adalah tidak boleh dibenarkan. Maka, selepas seseorang pembeli dianggap menerima barangan tersebut, seseorang itu hilang haknya untuk menolak barangan yang sama kemudiannya atas alasan pelanggaran syarat-syarat (lihat perenggan 14).

(3) Klausa 11 perjanjian tersebut yang mana telah mengetepikan waranti, syarat-syarat dan representasi tersirat adalah terpakai untuk kedua-dua barangan yang dikilangkan dan dihantarserah. Seterusnya, berdasarkan tingkah laku kedua-dua pihak di mana tingkah laku defendan memberikan perkhidmatan selepas jualan yang murah kepada plaintif selama enam bulan dan meningkatkan tempoh waranti dari tiga kepada enam bulan, pihak-pihak telah menerima tempoh yang diperuntukkan di mana klausa 11 hendaklah terpakai. Oleh itu, pernyataan plaintif bahawa klausa 11 hanya terpakai hanya untuk barangan yang dikilangkan dan bukannya yang dihantarserah harus ditolak (lihat perenggan 21).

(4) Di mana satu klausa pengecualian dan pengehadan liabiliti diterima pakai di dalam satu dokumen yang ditandatangani oleh orang yang terikat dengannya, seseorang itu adalah terikat dengan apa yang

ditandatangani olehnya sama ada ia telah membacanya atau tidak kecuali kesannya telah disalah nyata (lihat perenggan 38); *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 diikut. A

(5) Walaupun satu klausa pengehadan seharusnya dinyatakan secara jelas dan tidak kabur supaya berkesan dan perlu ditafsirkan secara *contra proferentem,* perkataan-perkataan yang relevan, sekiranya boleh, diberi makna biasa dan maksud yang jelas. Maka, klausa pengehadan tidak harus ditafsirkan secara ketat dan tegas seperti klausa pengecualian memandangkan persetujuan pengehadan liabiliti adalah lebih niat sebenar pihak-pihak (lihat perenggan 39). B

C

(6) Notis plaintif kepada satu syarikat di Amerika Syarikat bukan merupakan notis kepada defendan memandangkan kedua-duanya adalah entiti yang berasingan. Plaintif di dalam plidingnya hanya merujuk kepada defendan sebuah syarikat yang diperbadankan di Malaysia dan seterusnya tidak menyatakan di dalam pliding tersebut bahawa notis kepada sebuah syarikat di USA adalah notis kepada defendan. Oleh itu, plaintif adalah terikat dengan apa yang dinyatakan di dalam plidingnya (lihat perenggan 24). D

(7) Adalah tidak patut untuk bergantung dengan UCTA dan mengimpot peruntukkan tersebut di dalam udang-undang tempatan tanpa kebenaran secara ekspres oleh undang-undang tempatan. Akta kontrak dan Akta Spesifik Relif yang memperuntukkan kebanyakan remedi adalah lengkap dan meliputi kesemua aspek. Kedua-dua Akta yang spesifik ini meliputi remedi-remedi yang diperuntukkan oleh Common Law Inggeris dan mahkamah-mahkamah Malaysia harus enggan mengimport atau menerimapakai prinsip-prinsip UCTA di sini di mana adalah patut diingati bahawa di UK undang-undang kontrak adalah berdasarkan common law (lihat perenggan 32 dan 35). E F

(8) Seksyen 24(e) AK terpakai kepada balasan atau objek sesuatu perjanjian yang mana balasan atau objek tersebut adalah menyalahi undang-undang atau tidak mengikut undang-undang dan dengan itu bertentangan dengan polisi awam. Dalam kes ini, kedua-dua balasan atau objek perjanjian tersebut adalah tidak menyalahi undang-undang mahupun tidak mengikut undang-undang (lihat perenggan 37). G

(9) Dasar pengiraan ganti rugi oleh plaintif adalah tidak disokong oleh bukti-bukti dokumentari dan fakta-fakta yang ditegaskan. Cara pengiraan ganti rugi yang didakwa didapati arbitrari, tiada akaun-akaun pembelian batu-batan dan jenisnya telah dikemukakan, tiada akaun-akaun keuntungan dan keuntungan selepas penggantian drifter baru sepertimana didakwa yang telah diaudit dikemukakan, kegagalan plaintif menolak kos-kos operasi dan juga kegagalan plaintif dalam mengambil kira kecekapan mesin tersebut (lihat perenggan 43).] H I

Notes

For cases on terms of condition, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4621–4625.

Cases referred to

Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Anor [1983] 1 All ER 101 (refd)
Bernstein v Pamson Motors (Golders Green) Ltd [1987] 2 All ER 220 (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (refd)
Eastern Supply Co v Kerr [1974] 1 MLJ 10 (refd)
Green Ltd v Cade Bros [1978] 1 QB 602 (refd)
L'Estrange v F Graucob Ltd [1934] 2 KB 394 (folld)
Leaf v International Galleries [1950] 1 All ER 693 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin [1992] 1 MLJ 185 (not folld)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (refd)
Standard Chartered Bank v Boomland Development Sdn Bhd & 3 Ors [1997] 4 AMR 3442 (refd)
Suisse Atlantique Societe d'Armament Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 (refd)

Legislation referred to

Civil Law Act 1956 ss 3(1)(a), (c), 5, 5(1), (2)
Contracts Act 1950 ss 24(e)
Sale of Goods Act 1957 ss 15, 41(1), 42, 55, 55(1), 62, 63
Sale of Goods Act 1893 [Sing] s 14(1), (2)
Specific Relief Act
Unfair Contracts Terms Act 1977 [UK]

Lim Chong Fong (Chu Ai Li with him) (Azman Davidson & Co) for the plaintiff.
Goh Siu Lin (Shook Lin & Bok) for the defendant.

Kamalanathan Ratnam J:

AGREED FACTS

[1] On 28 May 1996, the plaintiff and the defendant had entered into an agreement for the sale of a used machine, an 'Ingersoll-Rand CM 351 Crawlair Drill c/w VL140 Drifter Serial No V93415' ('the said machine) at a price of RM130,000 subject to the terms and conditions contained in the purchase order No BW 3755 signed and accepted by the plaintiff and which said purchase order contained at the bottom left of the said purchase order the words, We have read and agreed to the Sales Conditions stated overleaf. The plaintiff also relied on various clauses in the said agreement.

CASE OF THE RESPECTIVE PARTIES

[2] The first issue is a question of fact as to whether the machine delivered on 15 July 1996 was actually fitted with a VL140 or VL120 drifter. It is the plaintiff's case that the machine was fitted with a VL120 drifter based on the evidence of PW1, a director of the plaintiff who testified that the drifter of the machine in the plaintiff's possession at all material times is a VL120 drifter and also based on the testimony of PW2. The defendant however stated that prior to the delivery of the said machine, the plaintiff was asked by the defendant to inspect the said machine and/or to engage their own independent technical advisers for a second opinion on the said machine. This the plaintiff elected not to do despite being accorded the opportunity. In fact DW2 the defendant's area manager had said that the plaintiff was its only customer who had elected not to view the said machine and DW2 had been with the defendant for the past 26 years. The said machine bearing serial number V93415, was confirmed to be fitted with a VL140 drifter prior to delivery to the plaintiff. Furthermore, the said machine was the only second hand machine for sale by the defendant. This was consistent with the contemporaneous documents. The defendant had also verified that the said machine was equipped with a VL140 drifter prior to delivery, using the finger test. This test is also used by the defendant on all new machines. This is the defendant's industry practice. At the material time, in 1996, the said machine (manufactured in 1989) was approximately seven years old, with a useful service life of 10-12 years, if well maintained. The said machine was delivered to the plaintiff's Jambul Indah site also known as the 'IJM site', on 15 July 1996 and it was tested and started-up and handed over to the plaintiff's representative, one Heng Wee Piao, on the said date, and he was also given the opportunity to inspect the said machine and he accepted the same without question. PW1 was also present at the time of the said delivery. PW1 holds a BSc in Engineering and knew which part of the used machine was called the drifter. He was also aware that the defendant sold drifters of various sizes and he had been given a photocopied manual for reference purposes. The plaintiff has been in the rock-blasting business for the last 26 years. PW1 had himself admitted that the plaintiff had used Crawlair drills before. The said machine in question was used by the plaintiff from 15 July 1996 to May 1998, a period of 22 months at the IJM site and at the PPH site. No written complaint was ever issued by the plaintiff to the defendant within the agreed six months warranty period. The e-mail dated 24 April 1998 and the letter dated 7 May 1998 complaining of the said machines, which are relied upon by the Plaintiff, were not issued to the Defendant, but to another legal entity in the United States of America which responded as follows:

> ... I am certain there has been no intention to misrepresent the machine as some other model. The Ingersoll-Rand Rock Drill division in Roanoke, Virginia is not involved in the sale of reconditioned units.

[3] Furthermore, PW1 was fully aware that he was purchasing a second hand machine and he knew and agreed during cross-examination that the drifter was the 'work horse' of the machine. On 14 July 1997, the plaintiff bought a new machine Ingersoll-Rand Crawlair Drill with a VL140 drifter from the defendant for RM215,000. This new machine was shipped to the PPH site in August 1997. A new machine fitted with a VL140 drifter cost RM218,000 in 1996. A new drifter VL140 purchased from the defendant would cost RM68,000. On 8 April 1998, the said machine was repaired due to drifter piston failure which could have resulted from various factors (eg lack of lubrication, side-rods not tightened or aligned properly or someone unscrewing/tampering with bolts/nuts of the side-rods of the drifter). It was during this time that the plaintiff was informed by one Mr Yeap in April 1988 that the machine was not equipped with a VL140 drifter. The defendant had, after the expiry of the six-month warranty period, continued to provide goods and after sale service and repair work on the used machine, as and when requested by the plaintiff, and the cost had amounted to RM31,338.41. The plaintiff had defaulted in payment of the said invoices issued by the defendant and had failed, refused and/or neglected to pay the outstanding sum or any part thereof despite repeated demands made by the defendant. By a letter dated 17 March 2000, the defendant through its solicitors, demanded payment of the outstanding sum due and owing as aforesaid.

FINDINGS OF THE COURT

1 Whether the drifter is a VL120 or a VL140

[4] Section 15 of the Sale of Goods Act 1957 ('the Act') (the section which concerns goods sold by description) reads as follows:

> Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description ...

[5] In other words s 15 implies a promise on the part of the seller that the goods correspond with the description. The defendant's evidence is that it had ascertained and conducted checks on all machines (new or used) including the said machine so as to ensure that it corresponded with the description of the machine, that was contracted for. In fact, DW1 the service manager of the defendant had personally inspected the said machine and had verified by using the visual test that the drifter was a VL140 Drifter bearing serial number V93415 before it was delivered to the plaintiff. DW4 the inventory supervisor of the defendant had supervised the loading of the said machine onto the lorry and had confirmed that the serial number was V93415. The serial number is found on a plate and is also stamped/engraved on the body of the main frame. It is the case of the plaintiff however that the drifter was found to be a VL120 drifter when measured on 27 March 2003 and this was seven years after the date of delivery. I find that it is also

incorrect for the plaintiff to suggest that the said machine was in the plaintiff's possession at all material times since it was transported to different sites to which other third parties had access. The Pre-Delivery-Inspection (PDI) conducted by the defendant using the visual test to confirm whether a drifter is a VL120 or a VL140 drifter is consistent with industry practice. This test used since 1975, emanated from the manufacturer to the defendant and is used even for new machines because if the measurement test is used, the machine would need to be dismantled and this would not be practicable. In fact there is no reason not to accept the testimony of DW1 that the PDI based on the finger test was the most reliable test. He had testified that the gap for a VL140 was 2mm and for a VL120 was 10mm. In any case the PDI check was done on the said machine on 8 April 1996 and rechecked on 9 April 1996, approximately five weeks prior to delivery. The serial number of the said machine was rechecked when being loaded for delivery.

[6] The plaintiff pointed out that the machine that was delivered at the site did not have the plate bearing serial number V93415 which was the number stated on the delivery note. Counsel for the plaintiff also pointed out that DW4 had testified that he did not know whether the machine was fitted with a VL140 drifter.

[7] I accept the explanation of the defendant that it is possible that the plate could have dropped off from the said machine's mainframe. However, the serial number was also stamped and engraved on the machine. Subsequent Job Acceptance Forms confirm that the said machine was the same one which was shipped bearing serial number V93415. In any event, the plaintiff should not be permitted to raise the issue of serial number as this was not the basis of the plaintiff's claim. The argument of the plaintiff that it was definitely not in its interest to tamper with its own machine, can cut both ways in that it certainly is not in the defendant's interest to tamper with its own machine and risk ruining its reputation. It is my judgment therefore that the plaintiff was indeed supplied with a VL140 drifter.

[8] An application of the 'finger test' or 'visual test' would have easily revealed that the difference between a VL120 Drifter and a VL140 Drifter was indeed apparent. In fact, the difference between both types of drifters could have been easily verifiable upon examination through the 'finger test' or upon the plaintiff obtaining a second opinion. It could also have been easily established that the machine bore the serial number V954115, if only the main frame was inspected. This, the plaintiff elected not to do. Accordingly, there is no breach of s 15 and the plaintiff's claim is not sustainable.

OPPORTUNITY TO EXAMINE

[9] It is important to note s 41(1) of the said Act which reads as follows:

> Where goods are delivered to the buyer which he has not previously examined, he is deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

[10] The above said section provides the purchaser a right to examine the goods delivered to him. Essentially, this means that if a purchaser has examined the goods, and has accepted them, he cannot then reject them after a reasonable time, as provided in s 42 which reads as follows:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[11] In *Eastern Supply Co v Kerr* [1974] 1 MLJ 10 Wee Chong Jin CJ said in the Court of Appeal at p 13:

> It was open to the respondent to have the car examined by an expert before having it driven away. He chose not to do so. Instead he used the car by the use made of it, by his wife for about two weeks. When during the course of the first few days the various minor defects which we have earlier referred to became apparent to his wife, he again had the opportunity of having the car examined by an expert but chose not to do so.

[12] The facts of the case in *Leaf v International Galleries* [1950] 1 All ER 693 would apply to this case. In *Leaf v International Galleries* the buyer bought from the sellers an oil painting of Salisbury Cathedral in March 1944 which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. In 1949 he found that the picture was not a Constable. On a claim by the buyer for the rescission of the contract on the ground that there had been an innocent misrepresentation, the Court of Appeal held that assuming that in a proper case a contract for the sale of goods passing by delivery could, after its completion by the delivery of the goods, be rescinded on the ground of innocent misrepresentation as to the quality of the chattel sold, the present claim, was not competent because the buyer had lost the right to reject on that ground when he accepted delivery of the picture, or, at least, when a reasonable time had elapsed after his acceptance, and five years was more than a reasonable time.

[13] In other words, the claim was rejected because the plaintiff had ample opportunity to examine it during the first few days or even a month after he had bought it. The plaintiff in this case, had had sufficient time to see if the Drifter was a VL120 or a VL140 yet he had kept quiet all the time and after using it for 22 months sought to make this claim. In my judgment the plaintiff cannot now claim to rescind.

[14] It is my view that the time and place of delivery is prima facie the reasonable time and place for the examination of the goods or at least a short time thereafter, depending on the circumstances of each case. On the facts, the plaintiff had been given the opportunity to inspect the machine prior to delivery. Even after delivery of the said machine to the IJM site, the plaintiff had ample time to examine it during the first few days to see whether the said machine was fitted with a VL140 drifter and to seek an expert's opinion. Instead, the plaintiff had accepted the said machine and used it for 22 months. The plaintiff had even purchased another new drifter which had been modified to suit the said machine and then sought to claim damages for non-conformity with description and alleged under-production loss, long after the expiry of the six-month warranty period. It is interesting to note that PW1 had during re-examination said that at the time of the purchase, the said machine was in the United States and thus, he did not inspect the machine. This is clearly untrue as the said machine was already in the defendant's Subang Jaya site.

[15] I would also rely on the judgment in *Eastern Supply Co* wherein the Singapore Court of Appeal held that even on the assumption that the appellants were in breach of the implied conditions under sub-s 14(1) and (2) of the Sale of Goods Act 1893, the respondent had not rejected the car within a reasonable time and must therefore be deemed to have accepted the car.

[16] In the circumstances, it is my judgment that once a buyer is deemed to have accepted the goods, he loses his right to reject the same for breach of conditions.

[17] It is always a question of fact whether or not a reasonable time had elapsed so as to preclude a buyer from rejecting the goods (see s 63 of the Act). As 'to what is reasonable time Rougier J said in *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 at p 230 that a reasonable time is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete.

2 The effect of exclusion/limitation of liability clause

[18] The defendant pleaded that it can contract out of the implied condition such as that under s 15 as this is expressly allowed by s 62 of the Sale of Goods Act which reads:

> where any right,, duty or liability would arise under a contract of sale by implication of law, it may be negatived by express agreement … .

[19] The defendant argued that the plaintiff had clearly agreed to be bound by the terms of the agreement especially cl 11 of the agreement dated 28 May 1996. Parties were of equal bargaining power and had negotiated on terms bearing in mind that this was a used machine. It is important in considering this argument to reproduce cl 11 of the said agreement.

11 WARRANTY

The Company warrants that the Equipment manufactured by it and delivered hereunder will be free of defects in material and workmanship for a period of six (6) months from the date of shipment. Should any failure to conform to this Warranty be reported in writing to the Company within said period, the Company shall, at its option, correct such nonconformity, by suitable repair to such Equipment or by furnishing a replacement part FOB ex works, provided the purchaser has properly stored, installed, maintained and operated such Equipment in accordance with good industry practices and has complied with specific recommendations of the Company. Accessories or equipment furnished by the Company but manufactured by others shall carry whatever warranty the manufacturers have conveyed to the Company and which can be passed on the Purchaser. The Company shall not be liable for any repairs, replacements or adjustments to the Equipment of any costs of labour performed by the Purchaser or others without the Company's prior written approval. The effects of corrosion, erosion and normal wear and tear are specifically excluded from the Company's Warranty. Performance warranties are limited to those specifically stated within the Company's proposal. Unless responsibilities for meeting such performance warranties are limited to specified shop or field tests, the Company's obligation shall be to correct in the manner and for the period of time provided above.

THE COMPANY EXCLUDES ALL OTHER CONDITIONS, WARRANTIES OR REPRESENTATIONS OF ALL KINDS EXPRESSED OR IMPLIED, STATUTORY OR OTHERWISE (EXCEPT THAT OF TITLE) INCLUDING ALL IMPLIED WARRANTIES AND CONDITIONS RELATING TO MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Correction by the Company of nonconformities whether patent or latent, in the manner and for the period of time provided above shall constitute fulfilment of all liabilities of the Company for such nonconformities whether based on contract, warranty, negligence, indemnity, strict liability or otherwise with respect to or arising out of such Equipment.

[20] It is the plaintiff's contention that cl 11 is not applicable because cl 11 only applied to equipment manufactured by the company and in this case the machine in question was not manufactured by the defendant.

[21] I must reject the plaintiff's submission as the said cl is also applicable to equipment delivered. If cl 11 were inapplicable then there would have been no reason for the plaintiff to ask for the warranty period to be increased to six months instead of the three months as fixed earlier. I further find that

based on the conduct of both parties namely by the defendant providing free aftercare services to the plaintiff for six months, the parties had accepted the period specified therein as reasonable and that cl 11 was to apply.

[22] The plaintiff next argued that in any case cl 11 had been superseded or varied by cl 8.3 of the Conditions of Sale attached to the Delivery Note. Clause 8.3 is reproduced herewith:

> Any claim by the Purchaser which is based on any defect in the quality or condition of the Equipment or their failure to correspond with specification shall be noticed in writing to the Company within seven (7) days from the date of delivery or where the defect or failure was not apparent on reasonable inspection, within seven (7) days after the discovery of the defect or failure. If the Purchaser does not notify the Company accordingly, the Purchaser shall not be entitled to the repair works specified in cl 8.03 hereof and the Company shall have no liability for such defect or failure and the Purchaser shall be bound to pay the total purchase price of the Equipment in accordance with the Contract.

[23] The plaintiff contended that it was not possible through reasonable inspection and delivery, to have discovered that the machine was not fitted with a VL140 drifter. However as soon as the plaintiff had discovered the non-compliance on 18 April 1998, the plaintiff had on 22 April 1998 that is within the required seven days, notified the defendant's principal in the United States of America who had notified the defendant on 24 April 1998. Relying on the decision of the Federal Court in *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185 at 195 the plaintiff argued that in any case, the seven-day notification required under cl 8 was void as it purported to circumvent the statute of limitation.

[24] Firstly it is my judgment that the plaintiff's notice to the USA Company is not notice to the defendant as both are separate entities. In fact even in its pleadings the plaintiff had only referred to the defendant as a Company incorporated in Malaysia and further, had made no averments in the pleadings that notice to the USA Company was notice to the defendant. The plaintiff must be bound by its pleadings. If the plaintiff purports to rely on cl 8.3 then I must accept the defence submission that the plaintiff had failed to comply with cl 13.03 which reads as follows:

> Any notices served in connection with this Contract shall be in writing and shall be deemed sufficiently served on the intended party if left addressed or sent by facsimile transmission to the intended party at that party's registered office or principal place of business or such other address as may have been notified to the party sending such notice from time to time or if sent to the intended party by registered post at any of the above said addresses. A notice sent by registered post shall be deemed to be given two (2) days after the posting of the same.

[25] Clearly no notice had been given to the defendant herein. It is obvious that the plaintiff is confused with the decision of the Federal Court in *New*

Zealand Insurance Co Ltd. The provision as found in cl 8 merely specifies a time frame of seven days for a buyer to notify defects etc, to the defendant. There is no bar to the plaintiff commencing an action against the plaintiff. Thus the *New Zealand Insurance Co Ltd* case has no bearing and is inapplicable.

FUNDAMENTAL BREACH

[26] The plaintiff next argued that even if cl 11 had not been superseded by cl 8.3 then cl 11, being an exemption cl becomes unenforceable by reason of the defendant's breach which went to the root of the contract since the breach violated the whole character of the machine purchased since what was allegedly supplied was the VL120 when it ought to have been the VL140. In support the plaintiff relied upon the case of *Suisse Atlantique Societe d'Armament Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 in which the House of Lords held that where the breach of contract which caused the delays complained of amounted to a fundamental breach or a breach going to the root of the contract, the appellants were entitled to repudiate the contract and that accordingly such breach prevented the respondents from relying on the exemption cl as limiting their liability.

[27] Firstly I must point out that as I have held earlier, the defendant is not in breach of the contract. In any case even if for the sake of completion I am to follow through with the argument of the defendant, can it be said that the plaintiff has proved a fundamental breach. Surely not on the facts of this case. Unlike in the *Suisse Atlantique* the type of example of fundamental breach as illustrated by the House of Lords was where the contract was for supply of peas, and beans were delivered instead, and where another illustration of chalk and cheese was made. In the case before me it was the case of a drifter and a drifter. Besides, the said machine was used by the plaintiff for its purpose for almost two years (22 months). I cannot by any stretch of the imagination hold that this is a fundamental breach and that the contractual substratum has been destroyed.

THE UK UNFAIR CONTRACTS TERMS ACT 1977 (UCTA)

[28] The plaintiff is seeking to rely on the UCTA by virtue of s 5(2) of the Civil Law Act 1956 (the CLA) . It is necessary therefore to reproduce s 5 of the CLA which reads as follows:

5 Application of English law in commercial matters

(1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had

to be decided in England, unless in any case other provision is or shall be made by any written law.

(2) In all questions or issues which arise or which have to be decided in the States of [Malacca, Penang, Sabah and Sarawak] with respect to the law concerning any of the matters referred to in subsection (1) , the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had 'arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

[29] However it is also necessary to note the provisions of s 3(1)(a) of the CLA which reads as follows:

3 Application of UK common law, rules of equity and certain statues

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity/ together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far' only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[30] Section 3(1)(a) of the CLA has a specific cut off date, ie 7 April 1956 for the application of the UK Common law, rules of equity and statutes, subject to the provision that such application is not to be inconsistent with local circumstances.

[31] It is also necessary to reproduce the relevant sections of the UCTA the plaintiff is relying on:

Liability arising in contract

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party the other cannot be reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfied the requirement of reasonableness.

Sec 11 The 'reasonableness' test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

[32] I do not think, it is appropriate to rely on the UCTA and to import its provisions into local law without express local legislation allowing it, bearing in mind that existing contract law as supplemented by local decisions are more than adequate. Besides it is for the legislature to make the move and to promulgate such a law if it is found to be necessary.

[33] I find that the words 'other provision is or shall be made by any written law' as referred to in sub-s 5(1) and (2) of the CLA, are of significance. To my mind the Contracts Act and the Specific Relief Act which provide for most remedies are sufficient to fall within the phrase referred to in sub-s 5(1) and (2) of the CLA. These two specific statutes cover the remedies provided for by the English Common law.

[34] Besides, the cut off date of 7 April 1956 affects only West Malaysia and does not apply to Melaka and Penang. Hence it is clear that such English adaptations do not naturally become part of Malaysian law and it is thus inappropriate to apply the UCTA as a general law of the land. It is interesting to note the observation made in *Cheshire, Fifoot and Furmston's Law of Contract* by Andrew Phang Boon Leong on this issue at pp 41–42:

What, then, about the reception of English statutes under s 5 of the Civil Law Act? Having regard to the difference in timing between s 5(1) on the one hand and s 5(2) on the other, it is submitted that this point is theoretically significant, since in so far as Malacca, Penang, Sabah and Sarawak are concerned, there is, as we have already seen, a continuous reception of English commercial (in this instance, statute) law. The latter situation should also be contrasted with that which exists under s 3: unlike the common law, there is no real overlap here for, as we have seen, there are (albeit different) cut-off dates clearly expressed in s 3(1)(a), (b) and (c); indeed, as again we have seen, s 3(1) (a) may not even provide for the reception of English statutes in the first place. Here, however, it is submitted that this difference between sections 3(1) and 5(1) and (2) is rendered more theoretical

than real, simply because the argument centring on displacement by, inter alia, both the Contracts and Specific Relief Acts by virtue of the final limbs in both s 5(1) and (2) would generally preclude the reception of most of the more common English contract statues in any event. In this respect, therefore, the manifold difficulties of interpretation canvassed in the Singapore context with regard to s 5 itself do not really arise in the practical sphere. Indeed, an even cursory glance at the Contracts Act reveals an intention to deal comprehensively with all the major contract law doctrines. This would result in, it is submitted, the non-reception of, for example, the Misrepresentation Act 1967, the Infants Relief Act 1874, the Minors' Contracts Act 1987, and . (probably) the Unfair Contract Terms Act, although the UK Marine Insurance Act 1906 has been held to apply. Indeed— and in so far as the States other than Penang, Malacca, Sabah and Sarawak are concerned— the cut-off date of 7 April 1956 (under s 5(1) would constitute yet another reason why statutes such as those just mentioned (other than, of course, the Infants Relief Act 1874) would not be received.

[35] As I had said earlier since the Contracts Act, the Specific Relief Act and the Sale of Goods Act are comprehensive and cover all aspects, the Malaysian Courts should be reluctant to import or to adapt principles of the UCTA locally as it should be remembered that in the UK, contract law is found in their common law. In *Standard Chartered Bank v Boomland Development Sdn Bhd & 3 Others* [1997] 4 AMR 3442 Richard Malanjum J (as he then was) also refused to apply the provision of the UCTA.

CONTRAVENTION OF PUBLIC POLICY

[36] The plaintiff further argued that cl 11 constituted an unreasonable depravation of the plaintiff's rights and is therefore void or unenforceable as being against public policy. The plaintiff relied on s 24(e) of the Contracts Act 1950 which reads as follows:

24 The consideration or object of an agreement is lawful, unless —

(a) …

(b) …

(c) …

(d) …

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[37] This argument of the plaintiff is totally misconceived. Section 24(e) applies to the consideration or object of an agreement which is illegal or unlawful and thus against public policy. In the case before me, neither the consideration nor the object of the agreement is illegal or unlawful (see *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (SC) at p 361) .

[38] It is trite law that where an exclusion clause or a limitation of liability clause is incorporated in a document signed by the person sought to be held bound by it, he or she is bound by what he signs whether he has read it or not unless its effect has been misrepresented (See *L'Estrange v F Graucob Ltd* [1934] 2 KB 394). Since there was no misrepresentation on the part of the defendant, the said cl 11 would be effective to exclude the defendant from any liability arising thereof of any breach of condition/warranty and the defendant is thus not liable for any loss or damage suffered by the plaintiff as claimed. (See *Green Ltd v Cade Bros* [1978] Vol 1 QB 602). I find that there is no breach, let alone any fundamental breach, on the part of the defendant so as to deny it of the right to rely on the exclusion clause. In fact, it cannot be denied that the plaintiff is still using the said machine to date. In any event, the law on the effect of. a cl excluding and/or limiting liability is clear and would depend on the construction of the contract as a whole. As there was an agreed limitation clause, this should be given effect to. By reason of the aforesaid, the defendant cannot be made liable for the losses allegedly sustained by the plaintiff.

[39] In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Anor* [1983] 1 All ER 101, the court held that the issue of whether a condition in a contract limiting liability was effective, depended on the construction of the condition in the context of the contract as a whole. Furthermore, although a limitation cl had to be clearly and unambiguously expressed in order to be effective and was to be construed *contra proferentem*, the relevant words were, if possible, to be given their natural, plain meaning. Thus, a limitation cl was not to be construed as rigidly and strictly as an exclusion cl since an agreed limitation of liability was more likely to accord with the true intention of the parties.

[40] Further in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, the Court held that the doctrine of fundamental breach by virtue of which the termination of a contract brought it, and, with it, any exclusion cl to an end was not good law; that the question whether and to what extent an exclusion cl was to be applied to any breach of contract was a matter of construction of the contract and normally when the parties were bargaining on equal terms they should be free to apportion the risks as they thought fit, making provision for their respective risks according to the terms they chose to agree.

DAMAGES

[41] The plaintiff claimed damages as follows:

(i)	loss due to under production	RM 945,000
(ii)	cost of repair	RM 50,000
		RM 995,000

[42] In response the defendant relied on cl 12 which is reproduced herewith:

12 Limitation of liability

The remedies of the Purchaser set forth herein are exclusive and the total liability of the Company with respect to his contract of the Equipment and services furnished hereunder, in connection with the performance or breach thereof, or from the manufacture, sale delivery, installation, repair or technical direction covered by or furnished under this contract, whether based on contract, warranty, negligence, indemnity, strict liability or otherwise shall not exceed the purchase price of the unit of Equipment upon which . such liability is based.

The company and its suppliers shall in no event be liable to the Purchaser any successors in interest or any beneficiary or assignee of this contract for any consequential, incidental, indirect, special or punitive damages arising out of this contract, of any breach thereof or any defect in or failure of or malfunction of the Equipment hereunder, whether based upon loss of use, lost profits or revenue, interest, lost goodwill, work stoppage, impairment of other goods, loss by reason of shutdown or non-operation, increased expenses of operation cost of purchase of replacement power or claims of Purchaser or customers of Purchaser for service interruption whether or not such loss or damage is based on contract, warranty, negligence, indemnity, strict liability or otherwise.

[43] Even though I have found that the plaintiff has failed to prove its case against the defendant higher authority suggests I ought to, in any event, decide the issue of damages which this court would have awarded the plaintiff, if it had succeeded. As for the first claim of RM945,000 due to alleged under production of rocks from 15 July 96 to 7 May 98, I find that the plaintiff's basis of calculation is unsupported by documentary evidence and the established facts of the case based on the following reasons:

(1) The loss claimed by the plaintiff is too remote and not in contemplation at the material time. The plaintiff's project at the IJM was stated to be completed on 1 December 1995 prior to the purchase of the said machine. As for the PPH project, this was awarded only on 13 June 1997;

(2) The method of computing the said sum appears to be arbitrary. PW1 had taken a diversity factor of 0.65 from his own assessment, unsupported by documents and empirical data. This is mere speculation on his part;

(3) During cross-examination, PW4 (the rock seller) had said that he issued monthly statement of accounts for rocks purchased. However, none of these monthly statements of accounts were included in any of the common agreed bundle of documents by the plaintiff, in support of its claim;

(4) There were no audited accounts furnished by the plaintiff to show it's alleged profit margin;

(5) PW4 had also confirmed that there were various grades of rock/soil and the price ranged from RM6 to RM10. He also said that the volume (ie tonnage) purchased was not fixed. The plaintiff has failed to establish what types/grade rock/soil and actual tonnage of rock were purchased by PW4. Additionally, the plaintiff had referred to the daily records on lorry loads, as recorded in the common agreed bundle of documents. However, this is unreliable and inconclusive, with insufficient details. There are doubts cast as to what were in fact transported by the said lorries, the loads could have included sand/dirt etc in addition to rocks. PW1 had agreed during cross-examination, that no tonnage was stated.

(6) Under cross-examination, PW1 agreed that the efficiency of the said machine would depend on various factors, such as rock/soil condition, topography of the site, skill of the drill operator and weather condition. All these would have a bearing on the daily production of rocks.

(7) The gross sum claimed of RM945,000 is based on RM10 per ton. However, the plaintiff had not deducted its operating expenses (eg cost of lorries, petrol, salaries of drill operators, depreciation and maintenance, etc) to establish its net profit. The plaintiff is seeking to unjustly enrich itself at the defendant's expense.

(8) It is an universally known fact that the performance of any second hand machine would generally be lower compared to one that is new, due to wear and tear of previous usage. Its performance would also be dependent on how the said machine was maintained;

(9) The plaintiff also failed to lead evidence as to the amount of profits it earned from the said machine in comparison with the productivity of the new equivalent machine which it purchased on 14 July 1997;

(10) The plaintiff had failed to lead evidence on the amount of profits earned after a new replacement drifter (from Sungei Way) was fitted on the said machine.

[44] In calculating damages it is necessary to bear in mind the views expressed in *McGregor On Damages* 16th Ed [1997] at p 893 (Para 891) which reads as follows:

> If the buyer, finding the goods deficient in use and therefore unable to yield the intended business profits, should replace them with others which because of their superiority result in greater profits, these profits must be taken into account in any claim by the buyer for loss of profits incurred before the goods had been replaced.

[45] The machine in question was already about seven years old at the time of delivery. It is unreasonable to suggest that a seven-year-old machine would have the same rate of productivity of a new machine as suggested by PW1. A more realistic rate would be about 40%-50% productivity.

[46] Based on all these factors I find that even on damages, the plaintiff has failed to prove its claim. The plaintiff's claim is therefore dismissed with costs.

THE COUNTERCLAIM

[47] The defendant has relied on s 55(1) of the Act which state as follows:

> where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

[48] There is no doubt that the plaintiff has not paid the defendant. Payment terms were within 30 days of the date of receipt of the invoice. Because of the delay in the payment the defendant is entitled to charge interest at 1.5% per month for all late payment.

[49] It is my judgment that the plaintiff is bound both by the provision of s 55(1) as well as the agreement and hence is liable towards payment of the invoices.

[50] I therefore enter judgment in respect of the counter claim as follows:

(a) the sum of RM31,338.41 as at 29 February 2000;

(b) interest thereon on RM23,022.88 at the rate of 18%pa with monthly rests from 1 March 2000 to the date of full payment; and

(c) costs.

Plaintiff's claim dismissed.

Reported by I Izzuddin